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No. 00-1305

In the
Supreme Court of the United States

KISMET INVESTORS, INC., A MINNESOTA CORPORATION,

Petitioner,

vs.

THE COUNTY OF BENTON, MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This supplemental responsive brief is submitted pursuant to Supreme Court Rule 15.8 because a new case, not available at the time of Respondent's last filing, has been recently decided.

ARGUMENT

This Court recently filed a decision in City of Los Angeles v. Alameda Books, Inc., 535 U.S. __ (May 13, 2002). Petitioner, after years of litigation, now contends that it would be proper for the Court to grant certiorari, vacate the judgment below and remand the matter for reconsideration in light of Alameda Books. This argument fails for two reasons: 1) the argument is not properly before this court; and 2) Petitioner's Supplemental Brief advances no rationale that casts doubt on the county's reliance on numerous studies.

I. THE ISSUE PETITIONER TRIES TO RAISE IS NOT PROPERLY BEFORE THIS COURT.

The issues presented in the initial Petition for Writ of Certiorai do not question the numerous specific

studies that the county relied on, the issue raised by Alameda Books. Instead the issues raised in the petition focus on data related to this one adult use, the King's Inn. A careful review of the issues contained in the petition shows that the issue of the adequacy of the studies was not raised. Petitioner's first issue is stated as follows:

> I. A SUBSTANTIAL CONSTITUTIONAL QUESTION EXISTS AS TO WHETHER THE MINNESOTA COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE COUNTY ON THE ISSUE OF WHETHER ITS ZONING ORDINANCE WAS "NARROWLY TAILORED" TO THOSE USES FOUND TO CAUSE ADVERSE SECONDARY EFFECTS, IN LIGHT OF SUBSTANTIAL AND LARGELY UNCONTRADICTED EVIDENCE THAT NO SUCH EFFECTS WERE CAUSED BY PETITIONER'S USE.

Pet. 11 (emphasis added). This issue does not assert that the methodology of the studies relied upon by the county was in any way deficient, but simply states that "no such effects were caused by Petitioner's use." The first issue of the petition does not raise the issue that

Petitioner now wishes to address, the adequacy of the studies.

The second issue raised in the petition is:

> II. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER THE ORDINANCE, IF IMPLEMENTED, WOULD HAVE THE EFFECT OF AMELIORATING ADVERSE SECONDARY EFFECTS.

Pet. 24. This second issue does not address the data or reasoning contained in the underlying studies, but instead addresses whether the amortization would result in a worsening of secondary effects. Id. at 25-26. This issue is unrelated to whether the county had a sufficient basis for passing its ordinance based upon the studies that were before it.

The third issue also has nothing to do with the issue that Petitioner contends now justifies the issuance of a writ. The third issue is whether sufficient alternative avenues of communication remained in the face of "off-street parking requirements." Id. at 28. Again, the third

issue is not the one that Petitioner now asks this Court to address.

It is fundamental that a party must include issues for review in its Petition for Writ of Certiorari. Yee v. Escondido, 503 U.S. 519, 537 (1992). A question that is merely "complementary" or "related" to the question presented in the petition is not "fairly included" therein. Id.; Izumi Seimitsu Kogyokabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 32 (1993).

Because Petitioner did not fairly raise the issue of the adequacy of the studies in its Petition for Writ of Certiorari, the Court should deny the Writ of Certiorari and end this lengthy and tortuous litigation.

II. PETITIONER HAS NOT "CAST DIRECT DOUBT" ON THE COUNTY'S RELIANCE ON THE NUMEROUS STUDIES IT CONSIDERED.

In its supplemental brief, Petitioner contends that the affidavits of an adult business lawyer and an adult business expert witness demonstrate the county's reliance upon "shoddy data or reasoning" so as to warrant further proceedings below. Alameda

Books, slip op at 11. But Petitioner never "succeed[ed] in casting doubt on the municipality's rationale." Id. Instead, the evidence that Petitioner relies on is itself so slipshod and poorly reasoned that it is insufficient to bring into question the county's reliance on the numerous studies it reviewed.

This is a case where the trial court had before it not a single study, but many, including several that were created near the time of the adoption of the county ordinance. The county relied on studies from the following communities: St. Paul, Minnesota; the Office of the Minnesota Attorney General; Indianapolis, Indiana; Rochester, Minnesota; Los Angeles, California; Phoenix, Arizona; Adams County, Colorado; Amarillo, Texas; and Austin, Texas. Pet. App. 55, 57-58. Here, in contrast to Alameda Books, the trial court specifically found that the county relied on at least nine separate studies showing the adverse secondary effects caused by adult businesses. Id.

To rebut these studies, the first piece of evidence Petitioner's Supplemental Brief points to is the Affidavit of Richard Wilson, a lawyer and adult business owner. Pet Supp. Brief 3; Pet. App. 120-27. Nowhere in his affidavit does Wilson even attempt to directly analyze or contradict the particular studies the county relied upon. Instead, the substance of his criticism of the studies is that "virtually all of those studies were done in the late 1970's or late 1980's, and involved studies of adult entertainment facilities that were in the nature of sleazy topless bars, most of which have gone out of existence today." Id. at 124-25. Wilson's failure to address the specifics of the studies or even identify which specific studies he is talking about is fatal to the contention that his affidavit succeeds in casting doubt on the county's rationale.

The other evidence that Petitioner points to in its supplemental brief also fails to bring into doubt the merits of the studies the county board had before it. The gist of this second argument is that the adult use

facility at issue here had a low demand for police services and that property values in the area actually increased. Pet. Supp. Brief 4-5. Preliminarily, it should be noted that the trial court specifically held that this particular witness, Bruce McLaughlin, whose demeanor the court had the opportunity to observe at trial, was not a credible witness. Finding of Fact No. 17, Pet. App. 34. More importantly, with respect to the property value analysis, McLaughlin compared countywide property values with a sample area that he created around the King's Inn. Since the King's Inn is located on a lake, much of the sample area used by McLaughlin was lakefront property. McLaughlin specifically notes he extended his sample area to include properties on the other side of the lake. Pet. App. 233. Comparing lakefront property values with countywide property values is facially suspect. This superficial and shoddy analysis of property values related to only one adult business does not "cast direct

doubt" on the county's rationale. Alameda Books, slip op. at 11.

McLaughlin's analysis regarding police services was equally suspect. McLaughlin concedes that the King's Inn had over 50% more police calls than a nearby bar, but then attempts to rationalize these calls based on the square footage of the building. Of all of the properties referred to in McLaughlin's analysis, the King's Inn had the most calls for police service. A-225-31. Also, despite Petitioner's contention that McLaughlin used five years of data, Pet. Supp. Brief 5, he states in his affidavit that he used only one. Pet. App. 225.

From a broader perspective, these details of police calls and property values with respect to this one establishment should logically have no affect on the outcome of this proceeding. Municipalities must pass zoning ordinances that apply to broad categories of adult use establishments. The permissible zoning criteria cannot hinge upon the vague and intangible

"sleazy" vs. "non-sleazy" analysis that is being advanced by the Petitioner. Neither can it make a difference that this particular business behaved better than other adult use establishments or was even the best-behaved adult use establishment following the years that Benton County enacted its ordinance.

One inevitable consequence of accepting Petitioner's argument is that the litigious adult use industry and municipalities would end up participating in depositions of individuals who call police. The courts would presumably wade through these individual calls to the local police department to determine which ones legitimately relate to the nature of the business and then use some formula to determine whether or not the business had somehow passed from the "non-sleazy" to the "sleazy" category of adult business based on the last year's statistics. Such an inquiry would be wasteful, and is not one required by any existing principle of constitutional law.

In Alameda Books the Court was faced with a trial court record that was not well-developed. Id., slip op. at 11. Here, by contrast, the record is well-developed. The trial court carefully reviewed the proceedings of the county and found that it reasonably relied upon almost a dozen studies. The petition should be denied.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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